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No. 83-850

In The
Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

JAMES CONNORS KARO, EVAN ROTH, MICHAEL GAYLORD STEELE, RICHARD MILES HORTON, and WILLIAM ROBERTSON HARLEY,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS KARO, ROTH AND STEELE

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QUESTIONS PRESENTED

The government's petition states the questions presented more favorably to the government's position than the facts and the Court of Appeals' holding would warrant. The following is a more accurate statement of the issues:

1. When government agents install a beeper in merchandise without a search warrant, at a time when the merchandise is possessed by a government agent but in transit to a defendant, does a fourth amendment-cognizable intrusion take place when the defendant takes possession of the merchandise? *United States v. Karo*, 710 F. 2d 1433, 1437 (10th Cir. 1983); Petition 6a[1]

2. Is "warrantless use of a beeper to monitor the location of a non-contraband withdrawn from public view inside private residences or similarly situated places . . . an unconstitutional search or seizure"? 710 F. 2d at 1439; Petition 10a.

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[1]By so stating the issue, respondents do not abandon their contention that this issue was dealt with only in dictum and therefore is not properly presented for review here.

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OPINIONS BELOW

The government omits any reference to or inclusion of the oral opinion of the district court, which is unreported.[2] That opinion is therefore reproduced as the Appendix to this brief.

[2]See Sup. Ct. R. 21.1(d), 21.1(k)(i), and 21.1(k)(ii).

FACTS

The government's statement of the facts is adequate except for the following errors and omissions.

The false affidavit, signed by a D.E.A. agent and drafted with the assistance of an assistant United States Attorney who knew the true facts, was not presented to a magistrate as the government says (Petition 6, n.4); it was presented directly to a United States district judge. It is this affidavit that the trial judge found to be "phony as a three dollar bill". (2A, *infra;* this and the quotation below are from the decision that the Solicitor General failed to include in the appendix to the Petition for Writ of Certiorari).

The government is correct in asserting that its agent and lawyer testified they had advised the judicial officer to whom they presented the affidavit that it was false. But it omits the more pertinent fact that the trial judge did not find that the judge who issued the warrant was so advised. Rather, he rebuffed the respondents' offer to call the issuing judge as a witness and their proffer that he would deny he was advised of the affidavit's falsity. He ruled that the government had "created the untenable situation" of asking one judge "to pass on the credibility of another." (Petition 21a; 2A-3A, *infra*). The trial judge then found:

> As far as the affidavit, I will say possibly there are not too many outright blatant falsehoods, but as a result of half-truths, innuendos, deliberate attempt to create an impression other than the actual fact, my view is that the original affidavit as putting it bluntly is as phony as a three-dollar bill. And then you have not only that, that it was deliberately conceived to

give a false impression, and I might add, a good job was done in that regard. Reading of that affidavit, you come out with a far different impression of the facts than the actual truth.

2A, *infra.*

REASONS FOR DENYING THE WRIT

POINT I: It is inappropriate for this Court to consider beeper issues so soon after United States v. Knotts.

Since the mid-1970's, there have been a number of federal appellate decisions on the fourth amendment implications of electronic tracking devices, universally known as "beepers."[3] After the ramifications had been debated and the issues crystalized in the lower courts for a half-dozen years or more, this Court granted certiorari and decided *United States v. Knotts*, 103 S. Ct. 1081 (1983).

The government now seeks certiorari against the very first appellate court beeper decision subsequent to *Knotts*. This Court allowed the issues to mature for several years in the lower courts before stepping into the fray. It hardly seems consistent for this Court to take another similar case now before the courts have had a chance to digest and apply *Knotts*, particularly when the Court of Appeals applied *Knotts* with a great deal of care and analysis.

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[3]Citations to several of the decisions and commentary they spawned during 1976-79 can be found in *United States v. Michael*, 622 F. 2d 744, 746-48, *vacated on banc*, 645 F. 2d 252 (5th Cir. 1980), *cert. denied*, 454 U. S. 950 (1981).

Knotts does not purport to definitively settle all beeper-related issues; it does provide the lower courts with this Court's rubric for analysis. If this rubric produces divergent analyses or results in the courts of appeals,[4] "there will be time enough then," *Knotts*, 103 S. Ct. at 1086, for this Court to resolve the issues enlightened *vel non* by the various lower court analyses.

POINT II: There is not now a clear conflict among the circuits.

The government's reliance here on asserted conflict among the circuits to justify certiorari misses the point: all of the cases it cites as being in conflict with the Court of Appeals' decision here were decided before *Knotts*. The government does not mention the two post-*Knotts* appellate decisions that analyze fourth amendment beeper issues; both of them *agree* with the Court of Appeals in this case. *United States v. Cassity*, No. 81-1565 (6th Cir. Oct. 31, 1983) (available Dec. 7, 1983 on LEXIS, Genfed Library Cir file); *United States v. Butts*, 710 F.2d 1139 (5th Cir.), *reh. en banc granted*, No. 82-1260 (Oct. 25, 1983). These cases focus more on the second issue here (whether the warrant clause of the fourth amendment applies) than the first (the moot question of installation of the beeper before receipt by the owner). Their analysis indicates that the *Knotts* decision may settle the

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[4]Scanning the names of the reported decisions leads to the surmise that the beeper is used primarily by federal officers, so resolution of the issue will not be of great concern to the states, *i. e.*, to the vast majority of the nation's courts and policemen. This leads one to question why the devices are not used more frequently if they are as highly effective and as minimally intrusive of cherished rights as the government argues.

conflict among the circuits regarding the "legitimate expectations of privacy in the respective locations subjected to beeper monitoring, . . . without a warrant." *Cassity*, LEXIS, slip op. at 8.

The Court of Appeals' thoughtful decision here, together with the various Justices' concurring opinions in *Knotts*, may also settle the question of whether delivery of a covertly installed beeper to a citizen constitutes an intrusion without a consent to "continue the installation once the item belongs to someone else." 710 F. 2d at 1438; Petition 8a.

Further refinement of these issues can be expected from the Fifth Circuit's pending *en banc* consideration of *Butts*.

POINT III: The Court of Appeals' decision rests soundly on established principles of expectation of privacy in the home.

The decision of the Tenth Circuit Court of Appeals is consistent with this Court's decision in *Knotts*. The *Knotts* beeper transmitted from two distinct places: (1) automobiles on public roads, and (2) "open fields" as defined by *Hester v. United States*, 265 U.S. 57 (1924). 103 S. Ct. at 1085, 1087. In our case, in addition to transmitting from automobiles on public roads, the beeper transmitted from inside four homes and two storage lockers.[5] This Court in *Knotts* would not have approved this behavior. "Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen

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[5]No rural areas were involved here, therefore, the "open fields doctrine" is of no avail to the government.

drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned. . . ." 103 S. Ct. at 1085.

The Court of Appeals here reaffirmed the door to the home as the "firm line" drawn by *Payton v. New York*, 445 U. S. 573, 590 (1980), that the fourth amendment establishes between citizens and their government. This door may be the "bright line" so diligently sought, but so difficult to find in other fourth amendment contexts. See, *e. g., Robbins v. California*, 453 U. S. 420, 427-31 (1981) (Powell, J. concurring).

Agents of the federal government crossed this line on not less than six occasions during the five months the beeper tracked these respondents' activities. As the Court of Appeals so aptly stated, the facts in this case present intrusions far more egregious than those evident in *Knotts:*

> In the case before us the beeper was monitored while the can was in private residences and storage lockers. The beeper gave law enforcement officials information that could not be discovered by ordinary visual surveillance, even had that surveillance been constant. The *Knotts* case involved surveillance over only a few days; monitoring in the instant case took place over five months. In *Knotts* the drum was never inside a residence; here the ether was inside four residences. In *Knotts* the officers lost track of the automobile carrying the drum once on the public highway; here the officers lost track of the ether can for significant periods of time, after the ether had come to rest in residences and a rented locker. In the instant case, most of the tracing to new locations was possible only by use of the direction finder to locate the beeper.

710 F. 2d at 1439; Petition 9a-10a.

The Court of Appeals for the Sixth Circuit recently held that a warrant is required before government agents can monitor a beeper located inside a home. *United States v. Cassity*, No. 81-1565 (6th Cir. 1983) (Available Dec. 7, 1983, on LEXIS, Genfed Library, Cir file), involved a virtual remake of the scenario here. In *Cassity*, the investigative efforts of the D. E. A. spanned five months during which time chemicals and equipment containing three beepers found their way into the homes of each defendant. There, too, the search warrants were invalid.

In reversing the denial of the defendant's motion to suppress evidence, the Sixth Circuit also viewed *Knotts* as relying upon the "automobile exception" to the fourth amendment, *Cardwell v. Lewis*, 417 U. S. 583 (1974) and the "open fields" doctrine, *Hester v. United States*, 265 U. S. 57 (1924). "Nothing in the Court's opinion [in *Knotts*] abrogates the sanctity of a private home or dwelling place." *Cassity*, LEXIS slip op. at 5.

Neither this Court's opinion in *Knotts*, nor the Court of Appeals opinion in this case do more than apply traditional fourth amendment concepts to innovative technology.[6] Review by this Court is unnecessary.

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[6]In a footnote, the government poses a conundrum. Petition 16-17 n. 8. In an attempt to say the problem is so conceptually difficult that the Court should grant certiorari and solve it by discarding the warrant requirement, the government suggests throwing out the baby with the bathwater. It is said that since the warrant cannot specify all homes that the beeper might enter, there can be no valid warrant. *Id.* The government cites no lower court decisions as evincing concern with

(Continued on following page)

POINT IV: A ruling justifying warrantless installation of a beeper would not change the result reached in this case.

The government's first issue assails the Court of Appeals' opinion that a warrant was required for the insertion of the beeper into Mr. Karo's ether before Mr. Karo came into possession of it. This was dictum or, at most, an alternative rationale for a decision as to Mr. Karo only, because the Court of Appeals also held that Mr. Karo suffered the same intrusion into his home as did the other four respondents.

The Court of Appeals' holding regarding respondent Karo is firmly rooted in his fourth amendment right to privacy inside his home. His rights in this case do not depend upon what rights he may have had at the time the agents installed their beeper. The installation issue, therefore, appears inappropriate for review.

POINT V: The infringement of Karo's fourth amendment rights began at the time the ether came into his possession.

Although the Court of Appeals based its decision as to all the respondents on the fourth amendment invasion of their homes and private storage lockers, that Court was also correct in holding that "before the government agents

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this rather arid intellectual exercise. If and when the lower courts do choose to engage in the exercise, several possibilities are readily apparent. Wiretaps, for example, present the same problem: The warrant can only specify the telephone on which the tap is placed, leaving open the certainty that the various unspecified persons who call, are called, or who simply happen to use the tapped phone will be intercepted.

could transfer the can of ether containing a beeper to Karo, they had to obtain an authorizing warrant." 710 F. 2d at 1439; Petition 9a. The logic of the Court of Appeals' decision is clear. Regardless of who has custody of the container at the time the beeper is installed and thus gives consent to the installation, the infringement of fourth amendment rights begins at the time the object comes into the target's possession. 710 F. 2d at 1438 n.3, Petition 8a, *citing United States v. Moore,* 562 F. 2d 106 (1st Cir. 1977), *cert. denied,* 435 U. S. 926 (1978) and *United States v. Clayborne,* 584 F. 2d 346 (10th Cir. 1978). So even if this issue were to be reached, a decision by this Court would probably not contribute greatly to the development of the law.

POINT VI: The Petition for certiorari was not timely filed.

The Court of Appeals' decision here was June 20, 1983; the government's petition for rehearing was denied on August 26, 1983. Almost four months after the decision and almost two months after the denial of rehearing, the Solicitor General filed an application for an extension of time to seek certiorari in October, 1983. The reason: "To determine whether to file a petition for a writ of certiorari . . . ." Yet, in a motion for extension of time to file its petition for rehearing in the Court of Appeals, the government represented that the Solicitor General and the Appellate Section of the Justice Department were, on June 27, 1983, commencing "review of the opinion and briefs in this matter to determine whether further appellate review should be sought."

The application for extension was routinely granted the day *before* the respondents' counsel learned, by receipt of the service copy, that the application had been

filed. Thus, the only opportunity for respondents to oppose the extension is in this brief.

This Court's Rule 20.6 requires a showing of "good cause," as well as specific "reasons why the granting of an extension of time is thought justified." The government's only attempt to comply with this rule was the application's statement that, in effect, the government had not yet made up its mind whether to seek certiorari. Because "such applications are not favored", *id.*, it should be presumed that litigants are expected to, at a bare minimum, decide whether to seek certiorari at some time during the sixty days allotted for this process. Most litigants are bound by the sixty days to actually prepare, print and file the petition. Normal prudence indicates that the government would start thinking whether it wanted to come to this Court as soon as it received the Court of Appeals' decision. That the Solicitor General cannot make up his mind in four months appears incredible. And, credible or not, inability to make one's mind up without some reason for this inability is not "good cause." It certainly does not comport with the spirit of the sixth amendment's speedy trial clause, or the Speedy Trial Act, 18 U. S. C. §§ 3161-74.

It may be that the Solicitor General's inability to make up his mind is attributable only to bureaucratic inertia. Since Circuit Justices grant such requests as a matter of course, denial of certiorari (there will be plenty of beeper cases in the future) may clear up some of this inertia.

It may be that the inability to decide reflects real problems with the appropriateness of this case as a ve-

hicle to consider these issues, as developed elsewhere in this brief. This case also illustrates the unsoundness of the argument the Solicitor General incorporates from his brief in *Knotts*[7] that the warrant requirement in these circumstances unduly hampers law enforcement. Petition 16-17; Brief for the United States at 30-31, 35, 39, *United States v. Knotts*, No. 81-1802 (U. S. 1983 Term). In our case, the government had no difficulty obtaining its search warrant; its problems began when it chose to lie to the district judge in the process. The "societal cost of obtaining a warrant," *Arkansas v. Sanders*, 442 U. S. 753, 759 (1979), would have been minimal had the government told the truth.

POINT VII: The government's contentions are not ripe for Supreme Court review.

There is a significant unresolved issue in this case. In both lower courts, the respondents argued that the D. E. A. agents' misrepresentations to the district judge constituted misconduct so outrageous as to require dismissal under the due process clause and the court's supervisory power. The factual situation is very much like that in *United States v. Cortina*, 630 F. 2d 1207, 1214-17 (7th Cir. 1980), as well as the *Cortina* court's legal analysis of *United States v. Payner*, 447 U. S. 727 (1980). Neither lower court has yet ruled on this contention. There has been no indication that the government believes the presently decreed suppression will preclude maintaining the prosecution against these respondents. *Cf. Michael v. United*

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[7]The government's *Knotts* brief is cited in the petition at page 17, note 7, for its arguments that no warrant should be required to monitor a beeper.

States, 454 U. S. 950 (1981) (White, J. dissenting) (another beeper case in which this court denied certiorari).

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 81-21 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES CONNORS KARO, et al.,

Defendants.

BE IT REMEMBERED, that on to-wit, the 11th day of May, 1981, this matter came on for Hearing on Motion before the HONORABLE HOWARD BRATTON, United States District Judge, sitting in open court at Albuquerque, New Mexico, at the hour of 9:30 o'clock A.M.

The Court: Thank you very much, counsel. We do have a very unfortunate situation, not the least of which is that the confidence of the Court and the affidavits that might be presented to it, I would say, is shaken at a minimum. I will just—the Motion to Suppress will be granted and I will give you my reasons why. Well, a chance to make some law in the Tenth Circuit on various points here, if you want. First of all, as to whether a warrant is needed for a beeper under these circumstances, there is, of course, a split in the circuits on that issue. It has been my feeling straight along, that a beeper is an intrusion; it's a search. It should require a warrant. Government agencies should not be free to just implant them

at will. It should come through the normal Fourth Amendment warrant probable cause process. And I would say very particularly, so I realize that one circuit, I think the Ninth or somebody—I think the Ninth, saying that it is not an intrusion because it does no more than track something that you could track with the eye, where you plant a beeper in a vehicle or something like that, that it could be followed. Well, five months—you can't—it's not possible to follow around for five months. That's what happened here as a result of having that beeper in there for five months. All told, I think a warrant for a beeper, under these circumstances, was required.

As far as the affidavit, I will say possibly there are not too many outright blatant falsehoods, but as a result of half-truths, innuendos, deliberate attempt to create an impression other than the actual fact, my view is that the original affidavit as putting it bluntly is as phony as a three-dollar bill. And then you have not only that, that it was deliberately conceived to give a false impression, and I might add, a good job was done in that regard. Reading of that affidavit, you come out with a far different impression of the facts than the actual truth.

Now, as to—I don't know that it would make any difference whether or not the affiant or the U. S. Attorney supplied additional information to a Magistrate issuing the affidavit or issuing the warrant, that is a Judge in this case, but under any circumstances, you have a flat conflict in the evidence between the D.E.A. agent and the U. S. Attorney, as to whether or not the Judge was told anything outside of the affidavit. Since the government created that situation, that conflict, it's easy to resolve, it goes against the government. I find that the Judge was

not told anything outside of the affidavit, if that is material.

Now, I think the law is clear as far as the probable cause, you can't go outside of the affidavit, the sworn testimony. Just as far as what's right and what's wrong, it presents a terrible situation the government has done and created here.

Now, as far as standing, in my view, the installation of a beeper is a continuing search. It's not just a search when it's put on the can on the loading dock, or wherever, it's a search wherever that can is tracing. And that's the purpose of the whole thing, is to—and as is evident in this case, it did a good job. I say, accordingly, I think each person has standing, has demonstrated standing to challenge, except maybe the Defendant Roth is the only one I have a question about in that regard. Everyone else has demonstrated some connection with, or expectation of privacy where the can was intruded. Some have demonstrated ownership or possession of it. But rather than further complicate the situation, I will just grant the motion to suppress as to all of the Defendants.

Now, as to the fact that there might have been additional probable cause developed and shown as the matter went along, that might be so. But I don't think you can cure the ill if it hadn't been for the faulty beginning, it would have lost track of the whole thing right at the start, and the fact that they subsequently developed probable cause, I think, is just a product of the initial improper affidavit and deception of the Court.

Now, in granting the Motion to Suppress, let me—I will just add another thing. I take no—I think there is

a great deal to be said for the Chief Justice's view that suppression is not necessarily the answer where the law officials do something improper. The Chief Justice's view that perhaps other solutions such as lawsuits, disciplinary action or other matters are more appropriate where perfectly reliable evidence is developed and then has to be suppressed because of something that has been done wrong, either deliberately or inadvertantly by the law officials. Unfortunately, this was done wrong, deliberately. Whether they thought they were doing wrong or not, they were. Perhaps one of these days the Chief Justice's view will prevail and will not be necessary to suppress reliable evidence because of the errors in malfeasance of the law enforcement officials. Those will be my findings and conclusions. And the order of the Court, the evidence seized at the—all of the evidence seized at the search of the house in Taos, will be suppressed. That makes it unnecessary, I suppose, to rule on the severance of counts—the other two counts as to the Defendant Karo. It makes it unnecessary to rule as to the Horton confession. That Motion to Suppress will be granted. I assume the government will want to exercise its right of an interlocutory appeal, and you can obtain a ruling on the various legal matters I have made—I have discussed here, and also if you want the factual matters I have ruled upon. That being the posture of the case, how do you want to handle it? Enter an order suppressing the motion, and then you can take your interlocutory appeal?

Mr. Smith: Judge, that's correct. There is one question about the posture of the case that occurs to me. That is, that you have suppressed the evidence seized in Taos in February. We still have Mr. Karo charged with possession and sale in Albuquerque on the 20th of September.

The Court: Those are the two counts I have set out. I haven't suppressed anything as to that. I said it makes it unnecessary to rule on the severance as to those two counts, because those are—that's a different matter.

What's your desire? Do you want to proceed to trial on those two counts while the other matter as to the basic lawsuit goes up to the circuit, or what?

Mr. Smith: I'd like to think about that, Your Honor. My inclination is to keep it all in one place.

The Court: Let me suggest to you, why don't you think it over, get together and present an order in accordance with what I have decided today. Defense, you can get out the order and consult with Mr. Smith and get it in the proper form where there is no question about it, and it's a final or appealable order, and which it is, of course. And get that to me in the next couple of days. And then we will enter that and then you can decide what you want to do. You will have to decide very promptly. I guess you have a trial date set for the first of June. You will have to decide whether to go up or call a halt before that.

Mr. Smith: Judge, I'd like to ask one question about one of your findings of fact, only because I will be asked. I'm not quarreling with it. I may not agree with it, but I'm only looking for the reference. May I do that?

The Court: What's your problem?

Mr. Smith: My question about—is the conflict which you have reference in testimony of Agent Rottinger and Mr. Blackmer concerning whether or not Judge Mechem was told about Mr. Mulenwig's cooperation. My recol-

lection of the testimony, and I only offer it as mine, is that there wasn't such a conflict. And I—if I miss something, I just want to know where that finding is rooted, not because I want to quarrel with it, but if somebody asks me, I want to be able to respond.

The Court: I thought it was very clear. At the end of his testimony, he said all he told Judge Mechem was that they were coming there because of the Law Clerk situation down in the Magistrate's Office.

Mr. Smith: Is that Mr. Blackmer or Mr. Rottinger?

The Court: Mr. Rottinger said that, and he was asked two or three times. That's exactly what he said. I don't think—I'm not sure if it would make any difference what is said outside of the affidavit and what not. But if there is any question about it, I make the specific finding that Judge Mechem was not told anything outside of the—as to the facts outside of the affidavits.

Court's in recess.